**U.S. Department of Labor**

Office of Administrative Law Judges
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**Issue date: 09Nov2001**

CASE NO.: 2000-LHC-1741

OWCP NO.: 18-068550

In the Matter of:

DELFINO AZCONA
Claimant

v.

SOUTH BAY SANDBLASTING & TANK CLEANING
Respondent

and

EAGLE INSURANCE COMPANIES
Carrier

APPEARANCES:

Melchor Quevedo, Esquire
Michael O'Connor, Esquire
For the Claimant

Barry Ponticello, Esquire
For the Employer and Carrier

BEFORE: ROBERT J. LESNICK
Administrative Law Judge

## DECISION AND ORDER

The above-captioned claim arises from a claim for compensation under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et. seq.*, (hereinafter "The Act"or "LHWCA"), The claim is brought by Delfino Azcona (hereinafter "Claimant") against South Bay Sandblasting and Tank Cleaning and Eagle Insurance Companies (hereinafter "Respondents").

## PROCEDURAL HISTORY

Claimant filed this claim for benefits under the Act on October 11, 1999. Claimant alleges that he is entitled to temporary total disability benefits from July 12, 1999 through May 30, 2000, the period of Claimant's vocational rehabilitation. Additionally, Claimant alleges that he is entitled to permanent partial disability benefits from May 30, 2000 up to the present time for a 31% impairment to his right upper extremity. The above-captioned claim was forwarded to the Office of Administrative Law Judges on March 29, 2000. The claim was scheduled for calendar call on February 5, 2001 before Administrative Law Judge Anne Beytin Torkington. Claimant then requested that a continuance be granted due to a scheduling conflict, which was granted on January 30, 2001. Administrative Law Judge David W. DiNardi issued a Notice of Calendar call for June 11, 2001 in San Diego, California. On April 3, 2001, Judge DiNardi assigned the above-captioned claim to the undersigned.

A hearing was conducted in San Diego, California on June 18, 2001 at which time all parties were afforded a full opportunity to present evidence and argument, as provided in the Act and the Regulations. During the hearing Claimant's Exhibits A1 through 8 and B1 through 7, Respondents' Exhibits A through H, and Administrative Law Judge's Exhibit 1 were received into evidence.[1] Respondents' Exhibit I was received post-hearing. No objection to the admission of this evidence was received. All of this evidence has been made part of the record.

## STIPULATIONS

The parties have stipulated to the following facts. Accordingly, I find that:

1.) This claim is covered by the Longshore and Harbor Workers' Compensation Act.

2.) Claimant was injured within the scope and course of his employment with Respondents on January 9, 1998.

3.) An employer/employee relationship existed at the time of Claimant's injury.

4.) Respondents were timely informed of Claimant's injury.

5.) Claimant's average weekly wage ("AWW") is $624.97.

6.) Claimant's compensation rate is $416.65.

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[1] The following abbreviations have been used in this opinion: RX = Respondents' exhibits; CX A & B = Claimant's exhibits; ALJX = Court exhibits; TR = Hearing Transcript.

7.) Claimant reached maximum medical improvement on July 12, 1999.

ISSUES

1.) The nature and extent of Claimant's permanent disability.

2.) Whether Claimant is entitled to temporary total disability benefits for the time that he was involved in vocational rehabilitation.

3.) Whether Claimant's attorney is entitled to fees and costs.

## Findings of Fact and Conclusions of Law

*Background*

Claimant completed up to his second semester of studies at the university in Tijuana, Mexico. (TR 30). This entailed 13 years of education. (TR 101). Claimant also served one year in the military in Mexico. (TR 102). Claimant arrived in the United States in 1978 or 1979. (TR 31). Claimant stated that he worked for Respondents as a painter for approximately 3 1/2 or 4 years before the date of the injury. (TR 33). Claimant received 4 months of vocational rehabilitation training as a microcomputer operator. (TR 31).

*Hearing Testimony*

*Claimant's Testimony*

Claimant testified at the formal hearing as to the nature of his employment with Respondent and his injury. Claimant stated that he worked as a painter. (TR 33). Claimant went on to explain that while in the employ of Respondents, Claimant painted the "inside of Navy vessels, fuel tanks, ballast tanks, coffer dam, double bottom, fresh water tanks, fuel tanks." (TR 33). Claimant stated that while in the employ of Respondents, he earned $600.00 per week. (TR 105).

Claimant testified that he injured his right wrist on January 9, 1998. Claimant stated further that at the time of the injury, he was preparing to paint the fuel tank on a vessel known as the Constellation. (TR 35). Claimant explained the injury was precipitated by Claimant attempting to climb through the inside of the vessel to arrive at the area that needed to be painted. (TR 35). At that time, Claimant slipped and hit his right wrist off of the steel inside of the vessel. (TR 35).

Claimant stated that he immediately felt pain in his right wrist. (TR 36). Claimant went on to say that he had no pain in his right hand prior to this injury. (TR 123). Claimant went on to finish his assigned job on the day of the injury and then reported the incident to his supervisor. (TR 38).

Claimant testified that his supervisor took him to see a physician and Claimant returned to work the day after the injury. (TR 39). Claimant stated that he then went to see Dr. Barttelbort and was told not to return to work. (TR 39). Claimant testified that Dr. Barttelbort found a "small crack that was arthritis" and returned Claimant to work (TR 40). Claimant stated further that he subsequently underwent two surgeries on his wrist. (TR 40).

On cross-examination, Claimant stated that his hand did not bleed when he sustained the injury. (TR 78). However, Claimant indicated that his hand was colored red the next day. (TR 78). Claimant also stated that on the day of the injury, he continued to use his right hand to complete his work for the day. (TR 81).

Claimant stated that he is now unable to push or lift heavy objects, he feels weak in his right wrist, and he harbors a constant concern that he is going to reinjure himself. (TR 44). Claimant returned to work in May, 2001 as a construction estimator. In this capacity, Claimant estimates jobs and supervises some workers. (TR 46). Claimant testified that he works only when he is able to find work. (TR 44). This is Claimant's only source of income. (TR 48). Claimant stated that he is presently earning approximately $300.00 per week. (TR 74).

Claimant explained that his job as an estimator does not allow for overtime, and that he rarely works more than 40 hours per week. (TR 117). Claimant stated that he attempts to protect his injured wrist by using a brace and an elbow pad. (TR 119). Claimant testified that he does lift trash bags as a part of his present job, with each weighing approximately 100 pounds. (TR 119).

Claimant stated further that in his present employment with Baja Sandblasting, he supervises personnel and does some estimating work. (TR 105). Claimant testified that the work includes sandblasting residential homes. (TR 106). In order to perform this function, Claimant needs bags of sand which are loaded into Claimant's truck by others. (TR 106). Claimant stated that he had to load the bags of sand on one occasion. (TR 106). Claimant stated that on the job site, he either uses his left hand or "pushes or kicks it to the trash." (TR 106 & 108).

Claimant went on to explain the limitations placed on him by virtue of his injury. Claimant stated that he cannot move his wrist in a circular motion or touch his thumb to his fingers. (TR 46). Claimant stated that he also experiences difficulty with writing. (TR 46). Claimant testified that he is unable to do routine household chores because such activities cause pain. (TR 51). Claimant said that his impairment is compounded by the fact that the injury is to Claimant's right wrist and Claimant is right-handed. (TR 47). Claimant stated that he wears a splint for his condition. (TR 47). Claimant testified that he has developed a "bump" on the side of his wrist, but that the "bump" is not where the Claimant struck his wrist. (TR 90-91).

Claimant testified that he underwent physical therapy for his right wrist. (TR 49). Claimant stated that he underwent 3 months of physical therapy that improved his condition for the time that he

was participating in the physical therapy activities. (TR 49). As for Claimant's future medical care, Claimant states that he was told by Dr. Mack that he may require an additional surgery to fuse the bones in his wrist. (TR 49-50). Claimant stated that Dr. Mack usually spends approximately 30 minutes per visit with Claimant and conducts a grip test on each visit. (TR 86-88).

In his report, Dr. Mack also noted a 1991 right wrist injury, Kienbock's Disease. (TR 94). Claimant would not describe this as an "injury." (TR 95). Claimant explained further that he received no medical attention for the 1991 injury. (TR 95). Claimant clarified that he was seen by a doctor, but that he did not receive any treatment. (TR 97). Claimant stated that he was seen by Dr. Vandell for only the Kienbock's Disease. (TR 98). Claimant testified that he also sustained an injury to his right wrist in 1994. (TR 99). Claimant does not consider either of these injuries to be serious because he never missed any work time because of the injuries. (TR 124). Claimant testified that he cannot remember if he filed any workers' compensation claims for these injuries. (TR 126).

Claimant underwent vocational rehabilitation in November, 1999, which resulted in him being able to type approximately 20 words per minute, however he tires after about 3 to 5 seconds of typing. (TR 51). Claimant's vocational rehabilitation ended in March, 2000. (TR 103). Claimant testified that after his vocational training, he tried to obtain employment in data entry, data processing, and micro-computer operation. (TR 52). Claimant stated that he also attempted to obtain employment in the customer service industry. (TR 53). Claimant testified that he contacted Budget Rent-a-Car, but was not offered a job. (TR 54). Claimant stated that he was never offered a job as a customer service representative or automobile rental clerk. (TR 56).

Claimant went on to explain that Ms. Paneda at the vocational rehabilitation center sent Claimant to several interviews and submitted 35 resumes on his behalf. (TR 66 & 67). Claimant stated that Ms. Paneda had "no luck" in finding employment for him. (TR 67). Claimant also stated that someone, other than Claimant, contacted San Diego National Bank for him. (TR 110). Claimant stated that he received no training in vocational rehabilitation that trained him to be a construction estimator. (TR 104).

In April and May of 2000, Claimant stated that Ms. Paneda contacted the employers listed on CX A8 on Claimant's behalf. (TR 68). Claimant explained that he himself contacted 8 of the employers and the rest were contacted by Ms. Paneda. (TR 70-71). Claimant was offered employment by Disguise Company, but that such employment was outside of the earning capacity anticipated by Claimant. (TR 71). Claimant stated that he contacted people regarding work, but he does not consider that activity to be "looking for work." (TR 130). Claimant also felt that the job offered was outside of Claimant's physical abilities. (TR 72). The limitations on Claimant's employment include not lifting more than 25 pounds and no forceful bending or gripping. The employment offered by Disguise Company was to pack boxes at $7.50 per hour. (TR 72).

Claimant stated that a sales position was open at Runners Sports, but that Claimant did not contact them personally. (TR 111). Claimant contacted Surface Technology regarding a supervisory position in deck surface preparation. (TR 111). Claimant also testified that he did not look for employment between January, 1998 and March, 2000. (TR 115). Claimant also testified as to the four contacts given to him by Mr. O'Connor. Claimant stated in his declaration that he had contacted all four employers, however, in his testimony he admitted that he had only contacted 2 of the employers. (TR 116). Claimant stated that his purpose in making contact with employers in August and September of 1999 was to challenge the validity of the labor market studies. (TR 131).

Claimant also testified as to his examination with Dr. Christopher Behr. Claimant stated that the face to face examination time was approximately 20 minutes. (TR 57). Claimant explained that he told Dr. Behr that he was experiencing pain, not discomfort. (TR 59). Claimant stated that he never told Dr. Behr that he experienced symptoms or pain only "once in awhile." (TR 59). Claimant also stated that he told Dr. Behr that he experiences numbness in his wrist "all the time." (TR 59). Dr. Behr also conducted a grip strength test. (TR 93).

*Claimant's Exhibits*

Claimant offered two sets of exhibits in the above-captioned claim.[2] Claimant submitted two labor market surveys conducted by Joyce B. Gill. Ms. Gill is a certified rehabilitation counselor. The first of the reports is dated September 4, 1999. (CX A1). Ms. Gill reviewed Claimant's medical records, 3 MRI reports of Claimant's right wrist, and occupational therapy records. The survey was prepared for August/September, 1999. Ms. Gill found that Claimant could be employed as a customer service representative at between $280.00 to $480.00 per week. Ms. Gill found 3 full time positions available at that time. Additionally, Ms. Gill found that Claimant could be employed as an automobile rental clerk at $280.00 to $415.00 per week. Ms. Gill found 4 full time availabilities in this area.

An additional labor market survey was issued by Ms. Gill on December 17, 1999. (CX A1). Ms. Gill prepared this report for July 12, 1999. Ms. Gill determined that Claimant could work as a customer service representative or an automobile rental clerk. Ms. Gill bases these findings on the limitations imposed by Dr. Mack. Ms. Gill determined that 9 full time openings existed for a customer service representative earning between $320.00 and $400.00 per week. Ms. Gill also found four full time openings for an automobile rental clerk earning $300.00 to $415.00 per week.

Claimant offered a claim payment history covering March 29, 1999 through July 22, 1999. (CX A2). Additionally, numerous correspondence from Claimant's counsel addressed to Respon

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[2] For future reference, I suggest that Claimant be more diligent in marking and submitting exhibits to the court. Several of Claimant's exhibits include various documents that are haphazardly thrown together. The Court was able, in this instance, to decipher the point of the exhibits.

dents' counsel are included in Claimant's exhibits. (CX A3). These correspondence deal with settlement offers made by Claimant to Respondents. There are also several correspondence covering the time period of August, 1999 through October, 2000. (CX A4).

On August 20, 1999, Claimant received notification that temporary disability benefits would cease because Claimant had reached permanent and stationary status as of July 12, 1999. At that point, Claimant had been paid temporary total disability benefits totaling $23, 332.40.[3] On October 11, 1999, Claimant was sent a copy of the labor market survey from Respondents establishing the existence of suitable alternative employment. By letter dated October 23, 2000, Respondents notified Claimant of the willingness to stipulate to 21% impairment. Proposed settlement documents, settling both the state and LHWCA claim are also included in this exhibit. These documents were never executed.

Claimant's pre-hearing statement and a copy of the Memorandum of Informal Conference are included as exhibits in this claim. (CX A5). Claimant was involved in vocational rehabilitation from November 8, 1999 through March 24, 2000. (CX A6). Additionally, Claimant's rehabilitation reports and progress reports are included in the record in this claim. (CX A6). These documents chart Claimant's successful movement through the vocational rehabilitation process.

Also included in Claimant's exhibits is medical documentation from both Dr. Gregory Mack and Dr. Robert Averill. Dr. Mack issued a Permanent and Stationary Report regarding Claimant on July 12, 1999. (CX A7). Dr. Mack completed a comprehensive summary of Claimant's medical history. Dr. Mack also reviewed Claimant's work history. Dr. Mack reviewed the procedures that he had performed and determined that considering Claimant did not wish to undergo any further surgeries, that Claimant's condition became permanent and stationary on July 12, 1999. At the time of this evaluation, Claimant reported to Dr. Mack that he was experiencing moderate "intermittent pain of right dominant wrist which limits activity." Claimant also complained of constant "weakness of right hand and wrist."

Dr. Mack noted that Claimant had two prior injuries to his right wrist. These injuries included a July 12, 1991 diagnosis of Kienbock's Disease of the right wrist. Additionally, Dr. Mack noted that Claimant suffered right shoulder strain, right elbow epicondylitis, and right wrist and hand strain on September 18, 1995. Dr. Mack noted that these wrist and hand diagnoses were not included in Dr. Mack's permanent and stationary report of February, 1995. On physical examination, Claimant complained of right wrist pain, weakness, localized tenderness, and swelling. Dr. Mack conducted a grip strength test and wrist range of motion test.

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[3] This figure represents temporary total disability benefits from September 4, 1998 through August 5, 1999 at $416.65 per week.

Dr. Mack reached the diagnoses of Kienbock's Disease of the right wrist and a sprain of Claimant's right wrist. Dr. Mack determined that Claimant suffers from a residual work related disability affecting Claimant's right wrist. Claimant sustained the injury that lead to this disability when he fell from a scaffolding while working in the scope of his employment. Dr. Mack also explained the circumstances of Claimant's two prior injuries. Claimant also fell from a scaffolding in relation to the July 12, 1991 right wrist injury. Dr. Mack explained that Claimant's 1991 injury was associated with the Kienbock's Disease. Claimant received no treatment for the 1991 injury and was able to return to work. Dr. Mack determined that Claimant's 1994 right wrist injury was overshadowed by Claimant's injuries to his right shoulder and elbow. Dr. Mack opined that Claimant currently suffers from residual pain and weakness with a limited range of motion. Therefore, Dr. Mack concluded that Claimant is unable to return to work as a spray painter.

Dr. Mack outlined both the objective and subjective factors regarding Claimant's disability. Dr. Mack indicates that the subjective factors include moderate intermittent pain in Claimant's right wrist that limits Claimant's ability to perform repetitive tasks or forceful gripping or grasping. Additionally, Claimant reports weakness in his grip strength in his right hand. Objectively, regarding Claimant's right wrist, Dr. Mack notes that Claimant has a grip strength of 70%, limited range of motion, swelling, x-ray changes of the right carpal lunate bone and abnormal calcifications in the ulnocarpal joint, MRI changes, and "intra-operative observation of loss cartilage surface of ulnar side of the proximal base of the lunate bone, thinning of triangular fibrocartilage, and chondromalacia of radiolunate joint."

Dr. Mack concluded that Claimant suffers from some residual limitation of the right wrist due to the January, 1998 injury. Dr. Mack attributes 2/3 of Claimant's disability to the January, 1998 injury and 1/3 of Claimant's disability to the 1991 and 1994 injuries. Dr. Mack limited Claimant's work duties by stating that Claimant should not life more than 25 pounds, no frequent lifting of more than 10 pounds, use of a wrist splint, no repetitive "gripping, grasping, twisting, torquing, pushing, or pulling with [Claimant's] right hand." Dr. Mack stated that Claimant may require future medical treatment including reconstructive surgery, occupational therapy, prescription medications, and biannual medical evaluations.

Dr. Mack determined that Claimant has lost 50% of his pre-injury "capacity for lifting, pushing, pulling, grasping, pinching, holding, torquing, or performing other activities of comparable physical effort." Dr. Mack stated that vocational rehabilitation was indicated because Claimant is unable to return to his work as a spray painter. Dr. Mack bases his conclusions on Claimant's subjective complaints and medical history, Mack's objective findings, and Dr. Mack's review of Claimant's history, physical examination, medical records, and Dr. Mack's clinical experience.

Dr. Mack issued a Special Supplemental Report on September 16, 1999. (CX A7). Dr. Mack found that Claimant suffers from a 21% total impairment. Dr. Mack bases this finding on the American Medical Association's *Guides to the Evaluation of Permanent Impairment.* Dr. Mack found that Claimant's present 21% impairment is attributed to Claimant's injuries of 1991 (4%); 1994

(10%); and the remainder being attributed to the 1998 injury. In rendering these figures, Dr. Mack took into consideration Claimant's loss of grip strength.

Dr. Mack issued a Special Addendum to Permanent and Stationary Report on December 20, 1999. (CX A7). In this addendum, Dr. Mack produces an estimate of the future medical care that may be necessary for Claimant. Dr. Mack produced a second Special Addendum to Permanent and Stationary Report on January 17, 2000. (CX A7). In this report, Dr. Mack reported that if Claimant were to undergo an arthrodesis with a bone graft, an intercarpal fusion with graft, or a proximal row carpectomy, Claimant would be able to return to work in approximately one month. Additionally, Claimant would be required to be on modified work status for 2 months, and could return to full duty in 3 to 6 months after the surgery.

Dr. Mack issued a Future Surgery Report on February 2, 2000. (CX A7). Dr. Mack clarified that Claimant may require either a proximal row carpectomy or an intercarpal arthrodesis with a bone graft. Dr. Mack stated further that Claimant may later need a total wrist arthrodesis. There are also multiple office notes in the record that appear to be from Claimant's treatment by Dr. Mack. (CX A7). However, these records are in no logical or coherent order, and will therefore, be discussed no further.

A Second Opinion Report was obtained from Dr. Robert Averill on May 10, 1999. (CX A7). Dr. Averill reported that he met with Claimant for approximately 40 minutes and reviewed Claimant's medical records for 1 1/2 hours. Dr. Averill noted that Claimant sustained his present injury when Claimant slipped while crawling on scaffolding and hit his right wrist "on steel." Claimant reported that his present symptoms include pain on the outer area and ulnar side of the right wrist, a lump on the right wrist, and chronic tendinitis. Dr. Averill conducted a comprehensive review of Claimant's medical records.

On physical examination, Dr. Averill found "fusiform swelling" of Claimant's right wrist. Additionally, Dr. Averill found "tenderness over the distal end of the ulnar styloid and pain with forced ulnar deviation of the wrist." Dr. Averill also noted that Claimant suffers from some tenderness at the "insertion of the flexor capri ulnaris tendon." Dr. Averill also reviewed an x-ray of Claimant's wrist. Dr. Averill diagnosed Claimant as suffering from Kienbock's Disease, chronic synovitis, flexor capri ulnaris tendinitis, and bony ossicles, all of the right wrist.

Dr. Averill explained that Claimant suffered from pain and discomfort after the January, 1998 incident. Dr. Averill noted that Claimant's Kienbock's Disease of the lunate is evident from both the x-ray and the MRI and had been treated conservatively. Dr. Averill determined that Claimant should never have been hired to serve as a painter for Respondents. Dr. Averill opines that considering that Claimant's work included heavy labor and constant squeezing, that such actions are detrimental to Claimant's Kienbock's Disease.

Dr. Averill noted that Claimant's January, 1998 injury was a second injury. Dr. Averill also noted that Claimant's injury has been treated appropriately by Drs. Mack and Barttelbort. Dr. Averill further noted that Claimant underwent a successful avascularization procedure that allowed the lunate to heal and prevented collapse. Dr. Averill also noted that there are multiple loose bodies and exposed bone on the ulnar side in Claimant's right wrist. Claimant reported to Dr. Averill a recent increase in symptoms on the ulnar side of his wrist. Dr. Averill opined that he would expect Kienbock's Disease to produce problems throughout Claimant's wrist. Dr. Averill opined further that Claimant's present pain is related to his previous industrial injuries. Dr. Averill determined that Claimant's condition was not permanent nor stationary at the time of this evaluation.

Dr. Averill determined that Claimant is "partially disabled and disabled from doing forceful squeezing, gripping, torquing, and twisting." Dr. Averill concluded that Claimant should be referred to vocational rehabilitation because he is a qualified injured worker.

Two operative reports also appear as a part of the record. The first is for an arthrotomy of the right wrist on August 5, 1998 and the second is for an arthroscopy of the right wrist on November 20, 1998. (CX A7). Claimant also submitted the names and contact information for 11 potential employers. (CX A8).

Claimant submitted a second set of exhibits at the time of the formal hearing in this matter. This compilation of exhibits includes a supplemental pre-trial statement, the declaration of Claimant, and the Declarations of Melchor Quevedo and Michael O'Connor regarding attorney fees and costs. (CX B1-B4). Additionally, Claimant's earnings statements and a proof of service are also included in the second set of exhibits. (CX B6 & B7).

A Supplemental Report was issued by Dr. Mack in this claim on June 4, 2001. (CX B5). Dr. Mack reiterated his findings from the July 12, 1999 report. Dr. Mack indicated that Claimant continues to experience pain in his right wrist and that such pain interferes with Claimant's lifting abilities. Dr. Mack also found moderate crepitus of the right wrist at this time. Dr. Mack diagnosed Claimant as suffering from posttraumatic arthritis of right wrist and Kienbock's Disease of the right wrist. Dr. Mack also indicated that Claimant has an increased grip loss from 30% to 40% since the time of Dr. Mack's last report.

Dr. Mack determined that this grip loss represents a 23% upper extremity impairment. Dr. Mack determined, applying the AMA *Guides to the Evaluation of Permanent Impairment* that 1/10 of Claimant's disability is due to the July, 1991 injury, 1/5 to the January, 1995 injury and 70% to the January, 1998 injury.

*Respondents' Exhibits*

On their behalf Respondents submit 9 exhibits for consideration by this Court. The records of Dr. Scott Barttelbort are contained in the record in this claim. (RX B). These records are offered by Respondents to establish the existence of a permanent impairment. The records cover the time period of March 19, 1998 through July 9, 1998. In March, 1998, Dr. Barttelbort found that Claimant's MRI study indicated the existence of Kienbock's Disease. Dr. Barttelbort also noted that some early damage to Claimant's wrist was indicated and can be attributed to a prior injury. Dr. Barttelbort opined that the January, 1998 injury exacerbated the previous condition. Dr. Barttelbort treated Claimant's condition with immobilization, anti-inflammatory medications, and rest. Dr. Barttelbort also indicated that the injury could require a wrist fusion.

Dr. Barttelbort saw Claimant again in April, 1998. Dr. Barttelbort found Claimant to be suffering from pain, swelling, numbness, and tingling that were improving. Dr. Barttelbort found Claimant's wrist to be weak with shooting pain and the wrist motion being decreased 50 percent. Dr. Barttelbort decided to pursue conservative treatment of Claimant's condition. Dr. Barttelbort followed up with Claimant in May, 1998 and determined that Claimant was able to continue to work in a modified duty status. Dr. Barttelbort saw Claimant again in June, 1998 and found that Claimant's wrist condition had worsened. Dr. Barttelbort found avascular necrosis of the lunate with possible a scapholunate tear. Dr. Barttelbort also indicated that Claimant has no symptomatic improvement.

Dr. Barttelbort saw Claimant for the final time in July, 1998. At that time, Dr. Barttelbort found that Claimant should not return to work. Dr. Barttelbort transferred Claimant's care to Dr. Mack indicating several treatment options. Dr. Barttelbort opined that Claimant would require a 3 month recovery period after surgery. If the revascularization procedure recommended by Dr. Barttelbort is not successful, further surgeries may be necessary.

Respondents also submitted the report of Dr. Christopher Behr, dated April 5, 2001. (RX F). Dr. Behr is board certified in orthopaedic surgery and serves as a team physician. Dr. Behr has also received numerous awards and published numerous articles and presentations. (RX H). Dr. Behr recited the history of the present injury as given to him by Claimant. Claimant stated to Dr. Behr that he was kneeling on a wooden plank when he began to slip, threw out his arms and hit the side of his hand on a steel wall. Dr. Behr reported that Claimant immediately experienced pain but that he finished the job to which he was assigned that day.

Claimant reported that his present symptoms included discomfort, not pain, that is present "once in awhile." Claimant also denied any previous work related injuries at this time. Dr. Behr conducted a review of Claimant's medical records as well as conducting a physical examination. Dr. Behr diagnosed Claimant as suffering from "industrially aggravated Kienbock's disease of right wrist" and "flexor carpi ulnaris tendinitis" of the right wrist. Dr. Behr found Claimant's injury to be a result of

repetitive trauma to the right wrist. Dr. Behr opined that Claimant's January, 1998 injury caused an increase in Claimant's symptoms.

Dr. Behr opined that Claimant's arthroscopic surgery would cause a loss of "articular cartilage on lunate bone which will cause permanent difficulties." Dr. Behr found, on physical examination, that Claimant had a decreased range of motion but that such decrease had improved since the time of the original injury. Dr. Behr also noted that Claimant showed some weakness in pinch and grip strength. Dr. Behr found Claimant's condition to be permanent and stationary at this time, but that Claimant's injury showed improvement since the time of Dr. Mack's July, 1999 evaluation.

Dr. Behr discussed that Claimant's condition would preclude him from performing very forceful activities involving the right wrist. Dr. Behr opined that Claimant has lost 25% of his pre-injury "capacity for lifting, pushing, pulling, grasping, pinching, holding, [and] torquing." Dr. Behr took into consideration both Claimant's subjective and objective factors of disability. Applying the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, Dr. Behr found Claimant to suffer from a 2% impairment of the upper extremity which equates to a 1% total person impairment. Dr. Behr concluded that Claimant suffers from pre-existing Kienbock's disease in his right wrist. Dr. Behr believes that this condition was industrially aggravated by the January, 1998 injury to the right wrist. Dr. Behr found that Claimant has received proper care for his condition, but that Claimant may require further surgery.

Dr. Behr issued a supplemental statement on May 4, 2001 finding that Claimant is physically capable of performing the duties of positions with "American Contact Lens Co., Budget Rent-A-Car, Ada Distribution, and Courtesy Auto Rental." (RX F).

Dr. Behr was also deposed on July 16, 2001 in connection with this claim. (RX I). Dr. Behr stated that he spent 30 minutes with Claimant, as well as reviewing Claimant's medical records. Dr. Behr explained that in completing his evaluation, he reviews a questionnaire with the patient and makes notes as he discusses the questions with the patient. Dr. Behr noted on this questionnaire that Claimant characterized his condition as discomfort and not pain. Dr. Behr also noted that Claimant stated that the discomfort was not constant and occurred only "once in awhile." Claimant stated to Dr. Behr that "he had a 23% disability rating for the January, 1998 right wrist injury."

Dr. Behr noted that Claimant underwent an evaluation for Kienbock's disease which is a condition that affects the lunate bone. Dr. Behr then reiterated his diagnoses that are noted in his report. Dr. Behr explained that he used the 4th Edition of the AMA *Guides* to arrive at an impairment percentage for Claimant. Dr. Behr explained further that he used 4 measurements to arrive at the impairment rating. Dr. Behr found a "2% upper extremity impairment due to loss of radial deviation" which correlates to a 1% whole person impairment. Dr. Behr went on the state that he did not use the grip strength test in determining Claimant's impairment. Dr. Behr stated that the grip strength test is

only to be used in "rare cases." Dr. Behr did not believe that Claimant's case warranted the use of this test. Additionally, Dr. Behr found the grip measurements to be unreliable.

Dr. Behr testified that Claimant's impairment is confined to his right wrist. Dr. Behr found no crepitus in Claimant's right wrist. Dr. Behr did find Kienbock's disease that was present before the January, 1998 injury. Dr. Behr reiterated that he found Claimant's condition to be an industrial aggravation of the Kienbock's disease. Dr. Behr opined that Claimant's January, 1998 injury was not enough of a traumatic event to have caused the Kienbock's disease.

The deposition testimony of Claimant is included in Respondents' exhibits. Claimant was deposed on October 11, 2000. (RX C). Claimant testified that he injured the right side of his hand/wrist in the 1980s while working for Zarcon Marine. Claimant stated that the pain associated with this problem would subside with rest. Claimant indicated that he received no other injuries that required medical attention. Claimant went on to state the January, 1998 injury is the only injury for which Claimant has received treatment.

Claimant stated that he worked for Respondent for 4 years before becoming injured. Claimant testified as to his work history as a painter. Claimant worked for Naval Coating (which later became Zarcon Marine) for 10 to 12 years on a call up basis. Claimant would be called when there was work to be done. Then Claimant worked for one year as a foreman of the surface preparation division for Sipco Marine. Claimant stated that he was terminated from this position for "speaking out." However, the official reason for Claimant's termination was sloppy work.

Claimant eventually went to work for Respondent. Claimant stated that he had suffered a prior elbow injury while painting. Claimant explained that he was taken to see a physician, was given medication, and began to feel better. Claimant then testified as to the January, 1998 injury. Claimant stated that he tried to catch himself so that he would not fall from a scaffolding and hit his hand on a steel wall. Claimant stated that he immediately felt pain.

Claimant testified that after the injury, he finished the job to which he was assigned. It took Claimant about 1 1/2 hours to complete the job using his right hand, feeling pain in his hand. Claimant then reported the injury to his supervisor immediately. Claimant testified that he never had any problems with his right hand or wrist prior to the January, 1998 injury. Claimant stated that the day after he struck his hand on the steel wall, he experienced swelling and went to see a physician.

Claimant saw a specialist the day after the injury. Claimant testified that he was told to wear a brace and return to work. Claimant worked for about 2 months after the injury before being told by a physician to stop working. Claimant stated that he has undergone 2 surgeries on his right wrist and that the surgeries made his condition feel better, but "not great."

Claimant received vocational rehabilitation training. Claimant testified that his understanding was that he was going to be taught the skills necessary to open his own business at vocational rehabilitation. Claimant stated that he studied computers in order to be able to use them in his business. Claimant testified that since working for Respondent, he began working for Baja Sandblasting in May, 2000. Claimant estimated that he works approximately 20 hours per week earning $250.00 to $300.00 per week. Claimant works as an estimator which requires him to supervise employees and give estimates to perspective clients. Claimant does not have to load or unload materials. Claimant stated that nothing at his present job causes him pain. In between the time that Claimant worked for Respondent and the time that he became employed by Baja Sandblasting, he did not look for employment. Claimant tried to start his own business at the beginning of 2000, but was unsuccessful.

Claimant does not wish to undergo any further surgeries. Claimant does physical therapy exercises for his wrist. However, Claimant is unable to participate in sports anymore and cannot breathe very well. Claimant also feels that he lacks strength in his right hand.

Respondents submit the medical reports of Dr. Mack. (RX A). These are offered to prove the existence of a permanent impairment. These records are duplicates of the records and reports contained in CX A7 and will therefore not be discussed further. Respondents also submitted correspondence between Respondents and Claimant to show the existence of settlement offers. (RX D). Respondents also submitted the labor market surveys conducted by Joyce Gill, in addition to her resume. (RX E&H). *See* CX A1 for discussion of the labor market surveys. Respondents also submit a print out of benefits already paid to Claimant to establish the amount of credit to which Respondents are entitled. (RX G).

## JURISDICTION

The parties have stipulated to the fact that jurisdiction exists under the Longshore and Harbor Workers' Compensation Act. I find this stipulation to be supported by the evidence of record. Therefore, I find that jurisdiction exists under the Longshore and Harbor Workers' Compensation Act.

## RESPONSIBLE EMPLOYER

Claimant's injury occurred while Claimant was employed by South Bay Sandblasting and Tank Cleaning, Inc. in January, 1998. The parties have agreed that Claimant was injured within the scope and course of his employment and that an employer/employee relationship existed at the time of the injury. Accordingly, South Bay Sandblasting and Tank Cleaning, Inc. is the properly designated responsible employer.

## TIMELINESS OF NOTICE

An employee has 30 days to provide notice to the employer of injury or death. 33 U.S.C. § 912. The time limitation begins when reasonable diligence would have disclosed the relationship between the injury and the employment. 33 U.S.C. § 912(a). A presumption exists in favor of sufficient notice of the claim having been given. 33 U.S.C. §912(b). The parties have stipulated to the fact that Claimant provided timely notice to Respondents of the injury. I find this stipulation to be supported by the evidence of record. Accordingly, I find that timely notice was provided.

## TIMELINESS OF CLAIM

The timeliness of the claim must be considered. Claimant's timely filing of the claim was not challenged by Respondents. As such, I find that the claim was filed timely.

## AVERAGE WEEKLY WAGE

The parties have stipulated to Claimant's average weekly wage. The parties agree that Claimant's average weekly wage is $624.97. This average weekly wage produces a compensation rate of $416.65. I find these stipulations to be supported by the evidence of record. Therefore, I find that Claimant's average weekly was is $624.97 for a compensation rate of $416.65.

## NATURE AND EXTENT OF DISABILITY

The first issue to determine with respect to the nature and extent of Claimant's disability is whether the injury is temporary or permanent. A finding that a disability is permanent has several effects. First, in the case of total disability, it allows the addition of a cost of living increase to the Claimant's benefits. *See* 33 U.S.C. § 910(f). Second, only payments by employers made for permanent disability are credited against the 104-week obligation, for purposes of contribution by the Special Fund, under Section 8(f) of the Act. *See* 33 U.S.C. § 908(f). Third, a Claimant's entitlement to benefits for a scheduled disability begins on the date of permanency. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 235 (1985).

The date on which a Claimant's condition has become permanent is primarily a medical determination. Thus, the medical evidence must establish the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985); *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984); *Rivera v. National Metal & Steel Corp.*, 16 BRBS 135, 137 (1984); *Miranda v. Excavation Constr.*, 13 BRBS 882, 884 (1981); *Greto v. Arpaia & Chapman*, 10 BRBS 1000, 1003 (1979).

The parties have stipulated to the date of maximum medical improvement. The parties agree that Claimant reached maximum medical improvement on July 12, 1999. I find this date to be supported by the evidence of record. Therefore, I find that Claimant reached maximum medical improvement on July 12, 1999.

Unless a worker is totally disabled, he is limited to the compensation under the appropriate schedule provisions. *Wilson v. Ingalls Shipbuilding,* 16 BRBS 168, 172 (1984). No party has alleged that Claimant is totally disabled, therefore, Claimant is limited to compensation under the appropriate schedule provisions. Compensation for permanent partial disability

> shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and shall be paid to the employee as follows:
>
> (1) Arm lost, three hundred and twelve weeks' compensation.
>
> (19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

There, however, is a dispute as to the extent of Claimant's disability. All of the physicians of record agree that Claimant is unable to return to his employment as a spray painter. Therefore, whether Claimant is able to return to his work as a spray painter is not an issue in this claim. In determining the level of Claimant's impairment, I am not bound by any particular formula. "[T]he Act does not require adherence to any particular guide or formula" and that the "administrative law judge was not bound by the doctor's opinion nor was he bound to apply the Guides or any other particular formula for measuring disability." *Mazze v. Frank J. Holleran, Inc.,* 9 BRBS 1053, 1055 (1978).

Several physician opinions appear as a part of the record in this claim. Dr. Mack found that Claimant had suffered two prior right wrist injuries. (CX A7). Dr. Mack examined Claimant and conducted a grip strength and range of motion test in determining the level of Claimant's impairment. Dr. Mack found that Claimant suffered a 40% loss of his grip strength due to his injuries. (CX B5). Dr. Mack also found that Claimant is limited in his ability to perform repetitive tasks or forceful grasping or gripping. Dr. Mack determined that Claimant retains only 50% of his pre-injury "capacity for lifting, pushing, pulling, grasping, pinching, holding, torquing, or performing other activities of comparable physical effort." Dr. Mack, considering Claimant's condition, originally rated Claimant's impairment at 21 percent. However, after finding moderate crepitus and an increase in Claimant's grip loss, Dr. Mack elevated Claimant's impairment to 23 percent.

Dr. Averill found that Claimant is "partially disabled and disabled from doing forceful squeezing, gripping, torquing, and twisting." However, Dr. Averill did not assess a percentage of disability to Claimant's impairment. Dr. Barttelbort's notes and opinions are not relevant in this discussion because he saw Claimant only before he reached maximum medical improvement. Dr. Behr found that Claimant has a decreased range of motion and some weakness in pinch and grip strength. Dr. Behr found that Claimant lost 25% of his pre-injury "capacity for lifting, pushing, pulling, grasping, pinching, holding, [and] torquing." (RX F). Dr. Behr assessed Claimant's impairment at 2 percent. Dr. Behr did not use the grip strength test to determine the level of Claimant's impairment because Dr. Behr states that the Guides state that grip strength should only be used in "rare cases." (RX I).

Claimant testified that he is unable to lift heavy objects and experiences weakness in his right wrist. However, Claimant also testified that he lifts 100 pound trash bags while working. (TR 119). Claimant stated that he cannot move his wrist in a circular motion (TR 46), has difficulty writing (TR 46), and cannot perform household chores (TR 47). Claimant stated that he had no prior injuries to his right wrist, yet it has been established that Claimant had two prior right wrist injuries. (RX C). I find Claimant's explanation for this oversight to be unpersuasive. Claimant has contradicted himself on numerous occasions regarding his right wrist injuries. Claimant also contradicted himself when discussing his looking for work. *See* TR 115-116. Claimant's answers to questions regarding the potential employers that he contacted were inconsistent and the inconsistencies were not adequately explained.

"[T]he determination of the credibility of a witness is exclusively within the realm of the trier of fact." *Peterson v. Washington Metro Area Auth.*, 13 BRBS 891 (1981). I accord little weight to Claimant's testimony regarding his right wrist impairment. I find Claimant's complaints of pain to be exaggerated. This Court is not bound to apply any particular formula in determining Claimant's impairment. It is within the discretion of this Court to "assess a degree of disability different from the ratings found by physicians if that degree is reasonable." *Id., citing Mazze*, 9 BRBS at 1053.

Dr. Mack found Claimant to suffer from a 23% impairment to his right wrist. Dr. Mack in rendering his assessment, in accordance with the AMA *Guides* considered Claimant's grip strength. Dr. Mack obviously relies significantly on this strength test. I assume this because Dr. Mack significantly raised Claimant's impairment percentage based on a drop in Claimant's grip strength. However, Dr. Mack does not state why he relies so heavily on this test. In the *Guides*, it states that grip strength should be considered in determining the level of impairment in "a rare case, if the examiner believes the patient's loss of strength represents an impairing factor that has not been considered adequately, the loss of strength may be rated separately." *Guides to the Evaluation of Permanent Impairment, Fourth Edition,* American Medical Association, 1993. Dr. Mack does not state in his reports or notes why Claimant's situation is a "rare case" and why this evaluation is important to properly assess Claimant's impairment. Therefore, I accord less weight to the reports and evaluation of Dr. Mack.

Dr. Averill does not assign any percentage to Claimant's impairment. He merely states that Claimant is "partially disabled." Whether Claimant is partially disabled does not appear to be disputed, therefore I accord less weight to the opinion of Dr. Averill because it offers nothing that is helpful to determining the level of Claimant's impairment. Dr. Behr finds that Claimant is impaired at a level of 2 percent. I find Dr. Behr's report unpersuasive also. Dr. Behr's report appears to be somewhat contradictory. Dr. Behr found that Claimant lost 25% of his pre-injury "capacity for lifting, pushing, pulling, grasping, pinching, holding, [and] torquing." (RX F). Yet, Dr. Behr found that Claimant suffers from only a 2% impairment. While Dr. Behr does appear to properly apply the AMA *Guides*, I find this unpersuasive in assessing the level of Claimant's impairment.

I find that Claimant suffers from a minimal loss of function. I find Dr. Mack's evaluation to be inflated and Dr. Behr's evaluation to be diminished. Therefore, I find that Claimant suffers from a minimal permanent partial disability to his right wrist. Considering that none of the physicians of record have offered a persuasive report, I find that Claimant suffers from a 5% impairment of his right wrist. I base this on the fact that all of physicians find that Claimant suffers from some permanent impairment. In light of the reports contained in the record, I find this assessment to be reasonable. Due to the injury of January 9, 1998, Claimant suffered a right wrist injury that caused a permanent partial disability. Because the 5% impairment to the right wrist and upper extremity essentially represents a partial loss of the use of the right arm, Claimant's compensation for the permanent partial disability to his right wrist is established by Section 8(c)(1) and (19) of the Act, based on an average weekly wage at the time of the injury of $624.97.

## TEMPORARY TOTAL DISABILITY BENEFITS WHILE UNDERGOING VOCATIONAL REHABILITATION

Claimant alleges that he is entitled to temporary total disability benefits for the time that he was involved in vocational rehabilitation. In lieu of submitting a closing statement in this claim, Claimant referred the Court to his pre-hearing statement. Claimant alleges that he is entitled to temporary total disability benefits (hereinafter "TTD") during the time that he was enrolled in vocational rehabilitation. Respondents allege that Claimant bears the burden of establishing entitlement to TTD, and that Claimant has failed to meet that burden.

There is no statutory or regulatory framework that addresses the issue of entitlement to TTD during vocational rehabilitation. However, there is judicially created law addressing this issue. The case which appears to be the case from which all others derive was rendered by the United States Court of Appeals for the Fifth Circuit. In *Louisiana Insurance Guaranty Assoc. v. Abbott,* 40 F.3d 122 (4th Cir. 1994), the Fifth Circuit addressed whether a claimant was entitled to TTD during vocational rehabilitation training. In *Abbott*, the claimant sustained an unscheduled injury to his back in the scope of his employment. Abbott was referred to vocational rehabilitation after his medical release. The Department of Labor (hereinafter "DOL") paid Abbott's tuition, required him to attend school full-time, and to maintain a certain grade point average.

Abbott's vocational rehabilitation specialist designed a program for Abbott to earn at least his pre-injury salary. Abbott was not permitted to work during this time period. After completing the program and performing an internship, Abbott began work as a medical technician. The issue before the Fifth Circuit in *Abbott* was whether "an injured worker [may] continue to receive permanent total disability benefits, while undergoing vocational rehabilitation if, but for the requirements of the retraining program, the individual would be able to take a minimum wage job?" *Id.* at 127.

The Court in *Abbott* noted that it is the goal of the Act to promote "the rehabilitation of injured employees to enable them to resume their places, to the greatest extent possible, as productive members of the work force." *Id. citing Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2nd Cir. 1991); *Stevens v. Director, OWCP,* 909 F.2d 1256, 1260 (9th Cir. 1990). The Fifth Circuit concluded that the restrictions placed on Abbott by the DOL made him "unavailable" for the minimum wage jobs that were available. *Id.* at 128. Additionally, it was found that the vocational rehabilitation increased Abbott's earning potential above minimum wage level which, in turn, lowered the employer's long term liability for compensation. The Fifth Circuit determined that while perhaps not the optimal plan, the vocational rehabilitation plan devised by the DOL was reasonable. *Id.* The Court concluded that

> [t]he Act gives the [DOL] the authority to direct rehabilitation programs; courts should not frustrate those efforts when they are reasonable and result in lower total compensation liability for the employer and its insurers in the long run.

*Id.* at 128.

The *Abbott* decision has been applied in at least two claims before the Benefits Review Board (hereinafter "Board"). Most recently, the Board applied the Fifth Circuit's *Abbott* decision in *Brown v. National Steel and Shipbuilding Co.*, BRB No. 00-0419 (Jan. 10, 2001). In *Brown*, the Board addressed the issue of the entitlement to TTD during vocational rehabilitation. Brown was afflicted with carpal tunnel syndrome as a result of work related activities and was found to be totally disabled. The Board makes clear in this decision, that the claimant bears the burden of establishing that "he is unable to perform suitable alternative employment due to his participation in a vocational training program." *Brown* at 3, *citing Abbott*, 40 F.3d at 128. The Board also pointed out that the vocational rehabilitation must further the interests of both sides.

Brown gained a benefit by obtaining "additional skills which consequently enhanced his ability to resume his place to the greatest extent possible as a productive member of the labor market." *Id.* at 4. Brown's employer gained a benefit by Brown undergoing vocational rehabilitation because Brown gained skills that would enable him to obtain suitable alternative employment. *Id.* The Administrative Law Judge in *Brown* credited Brown's testimony that he was physically exhausted after his retraining schedule. *Id.* Therefore, the Board determined that Brown was "incapable of working at a part-time

job during his participation in a vocational rehabilitation program" because such a finding was "supported by substantial evidence." *Id.*

The Board addressed the issue of TTD during vocational rehabilitation earlier in *Bush v. I.T.O. Corp.*, 32 BRBS 213 (1998). In *Bush*, the claimant sustained a herniated disk while working in the scope and course of his employment. Bush underwent a "DOL-sponsored reeducation and was able to obtain suitable alternative employment at a higher wage rate, this reducing his post-injury loss in earning capacity." *Id.* at 215. In *Bush*, the claimant sought TTD from the date of his injury until the date that he completed his vocational rehabilitation, at which time the claimant sought permanent partial disability. *Id.* at 217. Bush diligently completed the full-time rehabilitation program had increased his earning power at the end of the program. Bush was a full-time student and was required to maintain a certain grade point average. The Board noted that Bush's retraining would reduce the long-term compensation liability of the employer. *Id.* at 219.

There are several commonalities to these cases, however, the one that is most strongly expressed in each of these cases is that both sides must benefit from the vocational rehabilitation in order for the holding in *Abbott* to apply to the facts presented. Additionally, I note that the Court found in each of these cases that the claimant was physically unable to maintain part-time employment while undergoing vocational rehabilitation. In two of the cases, *Bush* and *Abbott*, the rehabilitation program was full-time and therefore left no time for additional work. In *Brown,* the administrative law judge credited the claimant's testimony that he was too fatigued after a day of training to be expected to maintain part-time employment. Because I have found Claimant's testimony to not be credible, for the reasons stated above, I place little value on Claimant's statements regarding his inability to retain part-time employment. *See* CX B2.

Most importantly, I find that Claimant's vocational rehabilitation did not result in a benefit to both parties. I am aware that it is not within the province of this court to frustrate the vocational rehabilitation efforts when they are reasonable and result in lower total compensation liability for the Respondents. I find that Claimant's vocational rehabilitation was reasonable in both duration and training. However, the rehabilitation training did not result in lower total compensation liability for Respondents.

Claimant stated that he did not gain any benefit from the vocational rehabilitation. Claimant testified that he could have been hired as an estimator before he underwent the vocational rehabilitation. (TR 104). Therefore, the training did not result in a benefit to Claimant. Additionally, the rehabilitation program did not result in a benefit to Respondents. Because Claimant sustained a scheduled injury, the amount that Claimant now earns is not relevant. Even if such an analysis were relevant regarding a scheduled injury, Claimant is presently working in an occupation that did not require any additional training. Therefore, Claimant's vocational rehabilitation did not benefit either party to this action and the payment of temporary total disability for the time in which Claimant was engaged in vocational rehabilitation is not warranted.

MEDICAL BENEFITS

"The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). For Claimant to receive medical expenses, the injury must be work-related. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). Once a Respondent is found to be liable for the payment of disability compensation benefits, that Respondent is also liable for medical expenses incurred as a result of the Claimant's injury, pursuant to Section 7(a). *Perez v. Sea-Land Servs., Inc.*, 8 BRBS 130, 140 (1978).

Claimant must establish that the medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130 (1981); *Suppa v. Lehigh Valley R.R. Co.*, 13 BRBS 374 (1981). Once a physician finds treatment necessary for the work-related condition, Claimant has established a prima facie case for compensable medical treatment. *Turner v. Chesapeake & Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). In order for a medical expense to be assessed against Respondent, the expense must be both reasonable and necessary. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). It is the Respondent's burden to raise the issue of the reasonableness and necessity of the treatment. *Salusky v. Army & Air Force Exchange Service*, 2 BRBS 22, 26 (1975).

Claimant's right to select his own physician is well-settled, pursuant to Section 7(b). 20 C.F.R. § 702.403; *Bulone v. Universal Terminal and Stevedore Corp.*, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for the work-related injury. 20 C.F.R. § 702.401(a); *Tough v. General Dynamics Corp.*, 22 BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978).

It is Respondents' duty to furnish appropriate medical care for the Claimant's right wrist injury, "and for such period as the nature of the injury or the process of recovery may require." As such, I find that Claimant is entitled to medical benefits for such time that the nature of the injury requires.

ATTORNEY'S FEES AND COSTS

Claimant's counsel submitted the declarations of both himself and Michael O'Connor regarding their work on this claim. (DX B3 & B4). However, these submissions are not complete. Therefore, thirty days (30) is hereby allowed to Claimant's counsel for the submission of an application for representative's fees and costs. *See* 20 C.F.R. § 702.132. A service sheet showing that service has been made upon all of the parties, including Claimant, must accompany the application. All parties have fifteen (15) days following the receipt of any such application within which to file any objections to the application.

## ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the record as a whole, the following shall become the final order of this court. Any specific numeric computations of the compensation award shall be performed by the District Director.

IT IS ORDERED THAT

1. Respondents shall pay to Delfino Azcona compensation for permanent partial disability due to a permanent 5% loss of use of his right arm caused by a January 9, 1998 right wrist injury, based on the average weekly wage of $624.97 and a compensation rate of $416.65, such compensation to be computed in accordance with Section 8(c)(1) and Section 8(c)(19) of the Act.

2. The permanent partial disability benefits to which Delfino Azcona is entitled shall begin on the date of maximum medical improvement, July 12, 1999 and continue until such time that Mr. Azcona's condition ceases to be permanently and partially disabling.

3. Delfino Azcona's request for temporary total disability benefits during vocational rehabilitation is DENIED.

4. Respondents shall furnish Delfino Azcona with medical benefits for such period as the nature of the injury may require.

5. Respondents shall receive credit for all amounts of compensation previously paid to Claimant as a result of the January 9,1998 accident.

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ROBERT J. LESNICK
Administrative Law Judge